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No.

In The

Supreme Court of the United States

October Term, 1997

ALAN BASCH, ROBERT EISENBERG, SUSAN WINSPEAR, PETER COUTU, THOMAS HOWELL, WILLIAM JORGENSEN, DIANA KURTZ, SCOTT SEENEY, SHANO EZZELL, ANDREW CHAPMAN and WILLIAM CONNELLY,

Petitioners,

vs.

THE GROUND ROUND, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN J. MARGOLIS
Counsel of Record
SARA FLESCHNER
KUSHNER, SANDERS & KRONE, LLP
Attorneys for Petitioners
20 William Street
Wellesley, Massachusetts 02181
(781) 431-1400

55 pp

QUESTIONS PRESENTED

1. May individual plaintiffs be denied the benefit of the tolling rule stated in *American Pipe & Construction Co. v. Utah* and *Crown, Cork & Seal Co. v. Parker* when they are members of the class described in a pending class action, but class status in a concurrent case has been denied?

2. Does the single-filing rule apply to validate the administrative claims of employees who are within the terms of an earlier, timely-filed administrative charge?

PARTIES

The petititioners are: Alan Basch, Robert Eisenberg, Susan Winspear, Peter Coutu, Thomas Howell, William Jorgenson, Diana Kurtz, Scott Seeney, Shano Ezzell, Andrew Chapman and William Connelly

The respondent is The Ground Round, Inc.

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The opinion of the District Court, *Basch v. The Ground Round, Inc.*, United States District Court, District of Massachusetts No. 95-12197RGS, is unpublished. It is reproduced at App. 15.

BASIS FOR JURISDICTION

The Court of Appeals for the First Circuit entered judgment against the petitioners on March 17, 1998. A petition for rehearing was timely filed. The petition for rehearing was denied on April 13, 1998. App. 14.

This Court has jurisdiction to entertain this petition under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

...

(d) *Filing of charge with Commission; timeliness; conciliation, conference, and persuasion*

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal

Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) *Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice*

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

STATEMENT OF THE CASE

The fundamental question presented by this case is whether individual plaintiffs may be denied the benefit of the tolling rule stated in *American Pipe & Construction Co. v.*

Utah, 414 U.S. 538, 551-53 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983) when they are members of the class described in a pending class action, but class status in a concurrent case has been denied.

The petitioners also suggest that the Court take this opportunity to adopt the single-filing rule, which permits individual claimants in employment discrimination cases to rely upon previously-filed administrative charges of other employees, so long as those charges provide fair notice to the administrative agency of the nature of the claims made.

PROCEDURAL HISTORY

This case comes before the Court on a petition for certiorari to the Court of Appeals for the First Circuit, which had jurisdiction to hear the case by virtue of 28 U.S.C. §1291. The Court of Appeals reviewed an unpublished decision by the District Court, which had jurisdiction over the case under 28 U.S.C. §1331.

FACTUAL BACKGROUND

The petitioners, all over forty, lost their management jobs at Ground Round, Inc. ("Ground Round") to younger replacements. (R. 79-104.)[1] They brought this suit against Ground Round to recover for a company-wide policy of age discrimination.

The respondent operates a chain of family-oriented casual restaurants, mainly in the Eastern and Midwestern states. During the plaintiffs' tenure, the company organized its operations into regions, consisting of 5 to 16 restaurants under the supervision of a regional director. Regions were then grouped into geographic divisions. (R. 47.)

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[1] References to the record below are shown as "(R.)."

In 1990, Ground Round appointed a new president and chief executive officer, Michael O'Donnell, who was at the time thirty-four years old. (R. 81A.) He later became chairman of the company's board of directors. After O'Donnell's arrival, the company began to dismiss management employees over the age of forty, including executives involved in restaurant operations, regional directors, restaurant general managers, assistant general managers and managerial personnel at the corporate headquarters. (*Id.*) Various reasons were given for the firings, which extended from corporate headquarters to each of the company's three geographic divisions.

The pattern of firings was accompanied by numerous statements by O'Donnell and executives working under him that demonstrated a bias against older workers. These included a remark by O'Donnell that, "The restaurant business is a young man's game," and another to the effect that he had succeeded in reducing the average age of restaurant general managers to 27 years old. (R. 26B, 26C.) Anthony Santarelli, a senior vice-president, a man approximately 35 years old, told the people working under him that, "We have some general managers that are 40 to 55 years old. They need to go away. We need to build a box around them and make them go away." (R. 26A.) Santarelli was also present on at least one occasion when managers were told "not to hire older people, unattractive people, homosexuals, African-Americans, short people or overweight people." (R. 363.)

Among those fired were the petitioners. They shared the characteristics of having held positions of responsibility for significant periods of time, having performed satisfactorily or better in their jobs and having been promoted, most of them several times. (R. 79, et seq.) Many of the petitioners had received substantial performance bonuses and were eligible

for further bonuses when they were dismissed. All but two of them were replaced by younger persons who were less qualified and paid less than the person fired.[2] (R. 82, 84, 88, 90, 92, 96, 98, 100, 102.)

At the times of their firings two of the petitioners were regional directors, five were restaurant general managers, one was an assistant restaurant general manager, and three were employed as managers at Ground Round's corporate headquarters. (R. 82, 83, 85, 87, 89, 91, 95,97, 99, 100, 101.)

The District Court granted summary judgment to Ground Round, ruling that some of the petitioners were not within the so-called "single-filing rule," because the earlier-filed administrative charges did not include class-wide allegations,[3] although accompanying letters from counsel did specify that a company-wide discriminatory policy was in place and that the employees intended to commence class action. The District Court also ruled that the petitioners had failed to file this action within the time allowed by 29 U.S.C. §626(e).

The Court of Appeals did not rule on the applicability of the single-filing rule (nor on Ground Round's assertion that the petitioners were barred by res judicata), but affirmed the District Court on the basis of the statute of limitations, 29 U.S.C. §626(e), ruling that the petitioners could not rely on a pending class-action claim against Ground Round, *Halligan v.*

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[2] The restaurant that one petitioner managed was closed and she was denied the opportunity to transfer to another restaurant, although two younger management trainees were hired in the same region during the week that she was dismissed. Another petitioner was fired during an alleged reorganization of the company's finance department.

[3] Six of the petitioners had failed to file individual administrative charges within the 300-day period provided by 29 U.S.C. §626(d).

The Ground Round, Inc., District of Massachusetts, Civil Action No. 93-12558RGS, to toll the statute of limitations under the rules of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551-53 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983). The Court ruled that the petitioners could not rely on *Halligan*, because class status had been denied previously in another action, *Dionne v. The Ground Round Inc.*, District of Massachusetts, Civil Action No. 93-11082-RGS.

Dionne was filed as a class-action age discrimination suit by Roger Dionne and William Hayden in April 1993. Several months later, two more former employees, David Halligan and Robert Whitelaw, sought admission as additional plaintiffs. On objection from respondent, permission was denied. Halligan and Whitelaw then filed a separate class action. At that time, no motion for class certification had been made in *Dionne*. That motion was made approximately a month after *Halligan* was filed. While class certification was pending, the *Halligan* plaintiffs sought to consolidate that case with *Dionne*; again on opposition from respondent, the District Court refused. In August 1993, the District Court denied the motion to certify the class. (R. 46.) The court found that the members of the prospective class were not similarly situated. However, the court virtually invited the plaintiffs to revive their motion if discovery should reveal sufficient information to justify class certification. (R. 46, 54.)[4]

The *Halligan* case continued and was pending as a class action when the present action was filed in the District Court. (R. 1, 78.)

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[4] Some of the petitioners moved to intervene in *Dionne*, which motion was denied by the District Court, affirmed by the Court of Appeals in an unpublished opinion, 66 F.3d 306 (1st Cir. 1995). The case was later settled.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI, BECAUSE THE RULE OF *AMERICAN PIPE*, TOLLING THE STATUTE OF LIMITATIONS, SHOULD PROTECT PETITIONERS WHO ARE MEMBERS OF THE CLASSES DESCRIBED IN CLASS ACTIONS FILED IN GOOD FAITH BEFORE THERE IS A DECISION RESPECTING CLASS CERTIFICATION.

THE *AMERICAN PIPE* RULE

In *American Pipe & Const. Co. v. Utah*, *supra*, 414 U.S. at 550, this Court declared that,

> Under present Rule 23...there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined.

The court went on to rule that the commencement of a class action tolled the statute of limitations for all parties named as members of the class, until such time as class certification was denied. This holding was amplified in *Crown, Cork & Seal Co. v. Parker*, *supra*, 462 U.S. at 349, 350.

The instant case presents a situation not contemplated in *American Pipe* or *Crown, Cork & Seal*: the petitioners were members of the defined class in a timely-filed action, *Halligan v. The Ground Round Inc.*, but they were also within the asserted class definition in a concurrent case, *Dionne v. The Ground Round Inc.*, in which class status was denied in August 1994, more than seven months after the *Halligan* complaint was filed. Relying on the continuing pendency of *Halligan*, the petitioners forebore to file individual complaints

until more than ninety days after the class certification decision in *Dionne*.

Read literally, the language of *American Pipe* and *Crown, Cork & Seal* applies the tolling rule to all but one of the petitioners, Susan Winspear:[5] "Once the statute of limitations is tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co. v. Parker*, supra, 462 U.S. at 354. All of the petitioners except Winspear would have been protected by the filing of *Halligan* without reference to the earlier *Dionne* complaint; that is, all of them either had claims pending before the relevant administrative agency within 90 days before the complaint in that case was filed, or would be deemed to have pending complaints under the single-filing rule (see post).

THE CONFLICT AMONG CIRCUITS

The Court of Appeals held that plaintiffs may not "stack" successive class actions. 139 F.3d at 11 (App. 9), relying on cases such as *Salazar–Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985). See, also, *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); and *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987). However, all of the cases cited by the Court of Appeals are distinguishable on one crucial point: in each of them, successive class actions were filed only after class status had been denied in an earlier case.

The case in which the applicabilty of the tolling rule to separate actions has been most closely analyzed is *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987). There, after examining the relevant precedents, including *Salazar-Calderon*, the Second

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[5] Her administrative complaint was dismissed more than 90 days before the complaint in *Halligan* was filed; she would remain a party only if the Court rules that both *Dionne* and *Halligan* tolled the statute of limitations.

Circuit described the applicability of the tolling rule in a manner contrary to the First Circuit's interpretation as it relates to the petitioners' claims:

> [W]e find the oft-repeated refrain which echoes through these cases compelling: the tolling rule established by American Pipe, and expanded upon by Crown Cork, was not intended to be applied to suspend the running of the statute of limitations for class action suits filed after a definitive determination of class certification...

827 F.2d at 879.

So far as the petitioners are aware, this is the first case since *Korwek v. Hunt* in which there has been more than one class action filed before a determination of class action was made. In all other cases, including those cited by the court below, the class actions have been successive, not concurrent. Thus, this case presents the first instance in which the conflict between the tolling rules as interpreted by the Second Circuit and the conflicting application of them by the First, Fifth, Sixth and Ninth Circuits arises in the context of an actual case and controversy.

Although the Second Circuit is in the minority among the circuits, its interpretation of *American Pipe* and *Crown, Cork & Seal* provides the best and fairest balance between the interests of the public in the enforcement of anti-discrimination and other laws, of the courts in judicial efficiency and economy, and of defendants in fair notice and a chance to mount adequate and effective defenses.[6]

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[6] The petitioners concede that such a rule would lead to dismissal of the class claims made in their complaint.

Applying tolling to concurrent cases would extend the statute of limitations, but it would do so moderately and only for plaintiffs who do not seek to abuse the tolling rules by filing class actions solely to to keep the statute tolled. Such a modest extension of *American Pipe* would benefit victims of discrimination and other class action plaintiffs, the public and the courts. Any claimed ill effects would be more than offset by the furthering of statutory policy, judicial economy and efficiency and the public interest that would result.

THIS CASE PRESENTS AN IMPORTANT ISSUE

As this Court noted in *McKennon v. Nashville Banner Publishing Co*, 513 U.S. 352, 357 (1995), Congress has erected a statutory structure "to eradicate discrimination in the workplace," one that reflects "a societal condemnation of invidious bias," as "part of a wider statutory scheme to protect employees in the workplace nationwide." Speaking specifically of the Age Discrimination in Employment Act (ADEA), the Court has held that "[t]he broad remedial goal of the statute should be enforced to the full extent of its terms." *Hoffman-La Roche, Inc. v. Sperling*, 495 U.S. 165, 170 (1989).

Class actions have been a vital tool in enforcing anti-discrimination laws. See, e.g., *Hoffman-La Roche, Inc. v. Sperling, supra; Crown, Cork & Seal Co. v. Parker, supra; Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 1982); *United Airlines v. McDonald*, 432 U.S. 385 (1977). They further the goal of eradicating discrimination by permitting numbers of employees, many of whom have lost their jobs and even careers as victims of prejudice, to obtain redress that would be difficult or impossible if they had to proceed alone. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 402-03 (1980).

In broader terms, allowing concurrent class actions to toll the statute of limitations would promote the "efficiency and economy of litigation that is a principal purpose of the procedure," *American Pipe & Const. Co. v. Utah*, supra, 414 U.S. at 538, without "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of American Pipe were designed to avoid." *Crown, Cork & Seal Co. v. Parker*, supra, 462 U.S. at 351. Although the *American Pipe* rule applies to cases in which class status is denied, it operates to encourage the use of that effcient procedure.

While the modestly extended tolling rule that the petitioners propose would protect plaintiffs, it would not prejudice defendants in any manner that the law recognizes. The concurrency of the actions would mean that defendants have notice at all times

> not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation...

American Pipe & Const. Co. v. Utah, supra, 414 U.S. at 555.

The Court of Appeals failed to address, or even acknowledge, the vital distinction between concurrent and successive class actions: When simultaneous class action suits are pending, the defendant is always aware of the size of the litigation and the risks it runs. When there is but one such suit at a time, denial of class certification entitles the defendant to "breath easy" and to assume—just as with the running of any statute of limitations—that it is free from the threat that it had

faced. In the instant case, Ground Round always knew that it faced at least one class action, and it was at all times "aware of the need to preserve evidence and witnesses respecting the claims of all members of the class." *Crown, Cork & Seal Co. v. Parker, supra*, 462 U.S. at 353.[7] The only prejudice that Ground Round would suffer from permitting this case to go to trial is the risk that it will be held liable for violating the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. That interest does not justify a narrow construction of *American Pipe* and *Crown, Cork & Seal.*

As the Court also noted in *Crown, Cork & Seal*, while restricting the reach of tolling

> might reduce the number of individual lawsuits filed against a particular defendant...this decrease in litigation would be counterbalanced by an increase in protective filings in all class actions. Moreover, although a defendant may prefer not to defend against multiple actions in multiple forums once a class has been decertified, this is not an interest that statutes of limitations are designed to protect.

462 U.S. at 353.

Nor would application of the tolling rule to concurrent class actions lead to the indefinite extension of the statute of limitations that the Court of Appeals feared. Limiting tolling to those class actions pending at the time of a first decision denying class status would extend the statute, but not

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[7] As the Court noted in *Crown, Cork & Seal*, "[Respondent's] complaints about the burden of defending multiple suits rings particularly hollow in this case, since [respondent] opposed [petitioners'] efforts to consolidate this action... 462 U.S. at 353, n. 6.

excessively. FED. R. CIV. P. 23(c)(1) directs the court to determine class status "as soon as practicable after the commencement of an action." An analysis of four federal districts computed that motions to certify are filed, on average, within three to four months the complaint, and ruled upon, on average, within three to eight months. Willging, et al. *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L.REV. 74, 101-02. Approximately doubling these periods (to account for the time that would be needed to determine class status in concurrent cases) would not present an excessive burden to defendants.

In contrast, an inflexible limitation of *American Pipe*'s tolling rule to a single class action would put deserving individual plaintiffs at risk. Although the *Halligan* and *Dionne* plaintiffs were represented by the same counsel and the definitions of the classes in each case was the same, that would not necessarily be true in other instances, and a rule that eliminates tolling for concurrent actions might work injustice on plaintiffs. Individuals may rely on the pendency of a pending class action to protect their rights without even knowing of another suit in which the class definition includes them. Thus, a decision in a case of which they are unaware could end the tolling period. Alternatively, class definitions in two cases might overlap only partially, so that a decision denying class certification in one of them would end tolling for some but not all of the plaintiffs in the other. Or, the District Court might certify a class in different terms than are set out in the complaint, thereby depriving certain plaintiffs in a second action of the benefit of the *American Pipe* rule. A fixed and inflexible interpretation of the rule would thus cause confusion, additional litigation and harm out of all proportion to the benefits that defendants might reap from being relieved of the need to defend against meritorious claims.

Should a court determine that a concurrent action was filed simply as insurance against an adverse decision on class certification, the *American Pipe* rule could be held inapplicable on the good-faith grounds. Clearly, that did not occur in the case at bar. Unlike the successive class actions in *Salazar-Calderon v. Presidio Valley Farmers Ass'n., supra, Andrews v. Orr, supra, Robbin v. Fluor Corp., supra*, or even *Korwek v. Hunt, supra*, here it is clear that *Halligan v. Ground Round* was filed in good faith and not for the purpose of extending the statute of limitations. Indeed, *Halligan* was filed and maintained as a second action only at the instance of the defendant and the District Court. Having placed Ground Round's former employees in the position of having to maintain separate class action suits against it, the company should not be heard to complain now about the effect of those cases in tolling the statute of limitations.

Adopting the Court of Appeals' interpretation of the *American Pipe* rule would lead to the filing of fewer class actions. However well-intentioned, a concurrent suit could leave the plaintiffs at the risk of class certification denial in a separate case. While that might seem to reduce congestion on court dockets it would likely be more than offset, as this Court recognized in *Crown, Cork & Seal, supra*, 462 U.S. at 353, by the filing of individual claims. More important, limiting access to the courts in that manner is contrary to the intent of Congress in enacting legislation that sanctions class actions, to Rule 23 and to numerous decisions of this and the lower courts about the role of class actions in American jurisprudence. C.f. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338-39 (1980).

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO HOLD THAT THE SINGLE-FILING RULE PERMITS EMPLOYEES TO MEET ADMINISTRATIVE FILING REQUIREMENTS OF ANTI-DISCRIMINATION STATUTES BY RELYING ON THE EARLIER FILINGS OF OTHER EMPLOYEES.

The Court of Appeals declined to rule on the applicability of the so-called single-filing (sometimes called "piggybacking") rule to the claims of seven of the petitioners. 139 F.3d at 10. (App. 6.)

The single-filing rule permits employees who have not filed claims with the relevant administrative agency(ies) (or have filed late) to rely on the earlier filings of other employees, so long as those filings gave the EEOC or corresponding state agency fair notice of the nature and breadth of the claims asserted by those invoking the rule's protection. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990).

All of the circuits that have ruled on the issue have held that employees who have not filed timely administrative claims (or have not filed at all) may nonetheless rely on the timely filings of other employees, so long as their claims give the agency notice that the complaint concerns more than isolated individuals. At least five circuits have also ruled that the single-filing rule applies to ADEA claims. *See, e.g., Grayson v. K Mart Corporation*, 79 F.3d 1086, 1105 (11th Cir. 1996); *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *Tolliver v. Xerox Corp., supra*, 918 F.2d at 1058; *Kloos v. Carter-Day Co., supra*, 799 F.2d 397, 401 (8th Cir. 1996); *Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988). The District Court ruled that the First Circuit would adopt the single-filing rule (R. 52, 369, App. 21), but as noted above, the Court of Appeals found it unnecessary to decide the issue.

Nonetheless, this Court should take the opportunity to remove all question and to adopt the single-filing rule.

The single-filing rule has a function analogous to the tolling rule of *American Pipe*. It provides the defendant with notice of the breadth and nature of the complaints against it, without requiring that each employee meet the administrative filing requirement—a practice that is of no practical use once the employer knows what claims it faces. The rule also limits the burden on administrative agencies by reducing the number of complaints to be filed. (As of November 1997, the Equal Employment Opportunity Commission reported a backlog of almost 80,000 cases. *EEOC Enforcement Activities*, http://www.eeoc.gov/entforce. html.)

In this case, the petitioners relied on the administrative claims made by Roger Dionne and William Hayden. (R. 12, 15.) Although the charge forms did not specify class-wide claims, the letters of counsel the accompanied the forms did make broad allegations of discrimination, sufficient to bring Dionne's and Hayden's claims within the single-filing rule and, under rules specific to ADEA cases, those letters themselves would have formed sufficient charges. *Roth v. Rhode Island Hospital Trust Nat'l. Bank*, 848 F.Supp. 15, 16 (D.R.I. 1994); 29 CFR §1626. This Court should hold that the single-filing rule does apply to this case, and should remand the matter to the Court of Appeals, to determine whether the filings relied on by the petitioners qualify for treatment under the rule.

CONCLUSION

For the reasons stated herein, the Court should grant this petition for certiorari, should determine that the statute of limitations applicable to the petitioners' claims was tolled under the rules of *American Pipe* and *Crown, Cork & Seal*, should further declare that the single-filing rule permits aggrieved employees to rely upon earlier filings that give the employer fair notice of the claims it faces, and should remand this matter to the Court of Appeals for further proceedings, as appropriate.

Respectfully submitted,

Jonathan J. Margolis,
Counsel of Record,
Kushner Sanders & Krone, LLP
20 William Street
Wellesley, MA 02181
(781) 431-1400

Sara Fleschner, of counsel
Kushner Sanders & Krone, LLP
20 William Street
Wellesley, MA 02181
(781) 431-1400

APPENDIX

APPENDIX

Alan BASCH, Robert Eisenberg, Susan Winspear, Peter Coutu, Thomas Howell, William Jorgensen, Diana Kurtz, Scott Seeney, Shano Ezzell, Andrew Chapman and William Connelly,
Plaintiffs, Appellants,

v.

THE GROUND ROUND, INC., Defendant, Appellee.

No. 97-1550.
United States Court of Appeals,
First Circuit.
Heard Feb. 4, 1998
March 17, 1998.

Appeal from the United States District Court for the District of Massachusetts [Hon. Richard G. Stearns, U.S. District Judge]

Jonathon J. Margolis, with whom Sara Fleschner and Kushner & Sanders were on brief, for appellants.

Edward P. Leibensperger, with whom Christa Von Der Luft and Nutter, McClennen & Fish were on brief, for appellee.

Before Boudin, Circuit Judge, Aldrich, Senior Circuit Judge, and Lynch, Circuit Judge.

LYNCH, Circuit Judge.

This case involves the intersection of the ADEA statute of limitations and the special tolling rules which may apply when the plaintiffs are within a class alleged but not certified in earlier ADEA actions. The plaintiffs are eleven

people, all over 40 years old, who lost their management level jobs at The Ground Round. In all, members of this group, represented by the same counsel, have filed four different actions accusing Ground Round of age discrimination. If this, the fourth action, is untimely, then the district court correctly entered summary judgment.

This action is untimely if the plaintiffs' otherwise concededly untimely claims are not saved by the fact that there were two prior lawsuits with class action allegations, and plaintiffs were within the classes alleged. We hold that this stacking of two class actions does not save the plaintiffs' claims. We affirm.

I.

This is the fourth lawsuit by former Ground Round employees alleging class-wide age discrimination by Ground Round. Each action described the same set of events (FN1) and asserted essentially the same class. The first such action, Dionne v. Ground Round, was filed in Massachusetts state court and removed by Ground Round to federal court based on plaintiffs' ADEA claims. The Dionne plaintiffs sought class certification, which the district court denied on July 6, 1994. The Dionne plaintiffs then voluntarily dismissed their ADEA claims and successfully moved to remand the case to state court.

The second action, Halligan v. Ground Round, was filed in federal district court on November 22, 1993. As of the time the complaint in this case was filed, the Halligan plaintiffs still had not moved for class certification. (FN2) On December 21, 1995, after the complaint in this case was filed, the Halligan plaintiffs voluntarily dismissed their ADEA claims and the action was dismissed.

After the district court denied class certification in Dionne, but before remand to state court, several members of

the putative class sought to intervene in that action. The district court denied their motion, at which point the would-be intervenors filed the third related lawsuit, Winspear v. Ground Round, in state court alleging only state-law causes of action. Seven of the plaintiffs in the Winspear action are plaintiffs here. The Massachusetts Superior Court granted Ground Round's motion for summary judgment in Winspear without reaching the merits. (FN3)

Plaintiffs here filed this action against Ground Round on October 6, 1995, alleging that Ground Round instituted a company-wide policy of dismissing older management workers and replacing them with younger workers, in violation of the ADEA. Plaintiffs claimed to represent a class of similarly situated former Ground Round employees. (FN4)

The plaintiffs here claim to represent the class of "all past, present and future managerial employees of Ground Round, who have been or may be terminated from their employment on the basis of age," not including those who left Ground Round's employ before January 1, 1990. The Dionne, Halligan, and Winspear complaints defined the putative class in a nearly identical manner.

Ground Round moved for summary judgment on several grounds. First, relying on the Massachusetts Superior Court's dismissal of the Winspear action to which seven of the present plaintiffs were parties, Ground Round argued that the claims of those seven plaintiffs (FN5) were barred by the doctrine of res judicata. The district court rejected this argument based on its conclusion that the Winspear action was dismissed for procedural reasons, and not on its merits.

Defendant's second argument for summary judgment was that the claims of seven plaintiffs (FN6) were barred

because those plaintiffs failed to file administrative charges with the EEOC within 300 days of their discharge from employment, as required by the ADEA. (FN7) The seven plaintiffs admit that they did not file administrative charges within the requisite time period, but argue that their claims are nevertheless saved by the "single-filing rule" adopted by the majority of circuits, but not yet addressed by this circuit. That rule, also referred to as "piggybacking," permits plaintiffs who have failed to file administrative charges, or who have filed untimely charges, to "piggyback" on the timely-filed charges of other plaintiffs, provided the timely-filed charge gives the EEOC and the employer adequate notice of allegations of class-wide discrimination. See Grayson v. K Mart Corp., 79 F.3d 1086, 1101-02 (11th Cir.1996); Howlett v. Holiday Inns, Inc., 49 F.3d 189, 194 (6th Cir.1995); Anson v. University of Tex. Health Science Ctr., 962 F.2d 539, 541-42 (5th Cir.1992); Tolliver v. Xerox Corp., 918 F.2d 1052, 1057-59 (2nd Cir.1990); Kloos v. Carter-Day Co., 799 F.2d 397, 400-401 (8th Cir.1986). (FN8)

Defendant also argued that even if the single-filing rule were adopted, plaintiffs' claims would still be barred because the timely-filed administrative charges on which plaintiffs rely provided inadequate notice of class-wide allegations. (FN9) See Kloos, 799 F.2d at 400 ("To be faithful to the purposes of the filing requirement, an administrative charge must allege class-wide age discrimination or claim to represent a class in order to serve as the basis for an ADEA class action...."). The district court found that this circuit would adopt the majority rule, but accepted defendant's argument that the single-filing rule offered plaintiffs no refuge here because the underlying

charges contained no allegations of class-wide discrimination.

Defendant's final argument for summary judgment was that the claims of all of the plaintiffs were time-barred for failure to file their complaint within 90 days of receiving notice from the EEOC of termination of its proceedings, as required by the ADEA. (FN10) The EEOC proceedings on plaintiffs' charges terminated at various dates between July 21, 1993, and January 4, 1995. This action was filed on October 6, 1995, long after the 90-day period had expired for all plaintiffs.

Plaintiffs concede they all missed the 90-day deadline for filing their complaint, but seek shelter in the statute of limitations tolling rule announced in American Pipe & Const. Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), and reiterated in Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). Those cases held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." American Pipe, 414 U.S. at 554. Plaintiffs argue that the filing of the Dionne and Halligan actions suspended the running of the statute of limitations for plaintiffs, who would have been members of the Dionne and Halligan classes had class certification been granted in those cases. The district court accepted the application of the American Pipe tolling rule, but rejected plaintiffs' argument that the rule saved their claims in this case.

Assuming arguendo that the American Pipe and Crown, Cork tolling rules apply to ADEA actions, we nevertheless find that plaintiffs' claims are time-barred. We

do not reach the merits of the res judicata or single-filing rule arguments.

II.

In American Pipe the Supreme Court balanced the policies served by the class action rule, Fed.R.Civ.P. 23, and the policies served by the statute of limitations. The case arose under the Sherman Antitrust Act, and was brought as a putative class action.

After the district court denied class certification, several would-be class members moved to intervene. Although the applicable statute of limitations had run as to the intervenors, the Supreme Court held that their claims were not time-barred because the filing of the putative class action tolled the statute of limitations as to all alleged class members until the district court denied certification, "at least where class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of all members is impracticable." Id. at 552-53 (internal quotation marks omitted).

In Crown, Cork, a Title VII case, the Court reaffirmed the American Pipe tolling rule and extended it to apply not only to plaintiffs who seek to intervene in the pending action, but also to would-be class members who file actions of their own. See id. at 349-50. The Court also did not limit its holding to instances when the class certification was denied solely on numerosity grounds.

A logical initial question is whether the Crown, Cork rule for Title VII cases also applies to ADEA cases. Defendant argues that these tolling rules do not apply to ADEA plaintiffs. This argument is grounded in the fact that both American Pipe (a Sherman Act case) and Crown, Cork

(a Title VII case) arose in the context of class actions brought under Fed.R.Civ.P. 23. Rule 23 provides that all members of a class are included in the action and are bound by the judgment unless they "opt out" of the action by affirmatively requesting exclusion. The ADEA, in contrast, adopts the enforcement procedures of the Fair Labor Standards Act, see 29 U.S.C. ss 201-219, which provides for an "opt in" procedure for class actions, requiring individuals to affirmatively file consent to the action in order to be a member of the class. See 29 U.S.C. ss 216(b), 626(b). Defendant contends that the difference between these two procedures results from different policy considerations, and that the rationale behind the American Pipe and Crown, Cork tolling rules does not apply in the context of "opt in" class actions.

The courts of appeals that have addressed this issue have split on the outcome. Compare Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463, 471-72 (3rd Cir.1994) (opt-in plaintiff may join ADEA action after limitations period for that individual plaintiff has run if the representative plaintiffs' actions are timely) with Grayson, 79 F.3d at 1106 (opt-in ADEA plaintiffs must meet the statute of limitations and may not rely on filing of class action complaint) and O'Connell v. Champion Int'l Corp., 812 F.2d 393, 394 (8th Cir.1987) (same). We consider this an issue of some complexity, and we do not reach or resolve it here. Even assuming that the American Pipe and Crown, Cork tolling rules do apply to ADEA actions, we find that the rules do not save plaintiffs' claims. This is because plaintiffs' claims depend on the "stacking" of two sequential class actions to keep their claims from being untimely. We do not believe the tolling rules were meant to permit the stacking of class actions.

In Crown, Cork, the Court stated that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." 462 U.S. at 354. In this case, the first class action relevant is the Dionne action. The Dionne action was filed as a putative class action on April 20, 1993, and the district court denied class certification on July 6, 1994. Plaintiffs here were within the class sought in Dionne. Applying American Pipe and Crown, Cork would toll the running of the 90-day limitations period for each plaintiff from April 20, 1993, until July 6, 1994. At that point, each plaintiff would have had at most 90 days to move to intervene in that action or to file an individual action. But plaintiffs did not do that. The complaint in this action was filed on October 6, 1995, more than 90 days after the denial of class certification in Dionne.

Plaintiffs argue that they are saved by the filing of the Halligan putative class action. Halligan was filed in November of 1993, after Dionne was filed but before the court had denied class certification in Dionne. Halligan remained pending as an asserted but not certified class action, plaintiffs not yet having moved for class certification, on the day the instant action was filed. Plaintiffs claim that because "at all relevant times there was at least one class-action suit pending against Ground Round, and each of the plaintiffs was a member of the defined classes in those cases[, t]hose actions tolled the statute of limitations."

We disagree.

The Halligan complaint alleged the same class and the same claims as did the Dionne complaint. In fact, the named plaintiff, David Halligan, was active in the effort to

attain class certification in the Dionne action. Halligan submitted an affidavit in support of the Dionne motion to certify a class, in which he alleged age discrimination by Ground Round.

The policies--respect for Rule 23 and considerations of judicial economy--which animated the Crown, Cork and American Pipe tolling rules dictate that the tolling rules, if adopted at all in ADEA cases, not permit plaintiffs to stretch out limitations periods by bringing successive class actions.

Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class. This simply cannot be what the American Pipe rule was intended to allow, and we decline to embrace such an extension of that rule. At least one of our sister circuits agrees. See Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir.1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any."). On closely related issues, each court of appeals to address the question has reasoned similarly and rejected efforts by late plaintiffs to resuscitate their claims through stacking of subsequent class actions. See Andrews v. Orr, 851 F.2d 146, 149 (6th Cir.1988) (class action tolls statute of limitations only for subsequent individual actions, not for subsequent class action alleging similar class and similar claims); Robbin v. Fluor Corp., 835 F.2d 213, 214 (9th

Cir.1987) (same); Korwek v. Hunt, 827 F.2d 874, 879 (2d Cir.1987) (same).

The dangers which Justice Blackmun warned against in his concurring opinion in American Pipe are vividly demonstrated by plaintiffs' theory. Justice Blackmun wrote separately to stress that the Court's decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561 (Blackmun, J. concurring). This point was emphasized by Justice O'Connor in her Crown, Cork concurrence, in which she stated that "[t]he tolling rule of American Pipe is a generous one, inviting abuse." 462 U.S. at 354 (O'Connor, J., concurring). Rational policy considerations led the Congress to impose a statute of limitations on the bringing of ADEA actions. After class certification has been denied in an action, potential individual plaintiffs cannot extend that limitations period by relying on successive class actions which allege the same class and the same claims. Plaintiffs' claims are therefore time-barred, and the district court properly entered summary judgment in Ground Round's favor.

Affirmed. Costs to defendant.

FN1. The claim in all four lawsuits was that plaintiffs were fired by Ground Round "on pretextual grounds from managerial positions," and that "[t]he real cause of their dismissals was the defendant's unlawful, company-wide policy of age discrimination, under which it replaced older, senior-level, more highly compensated employees with junior level individuals who were younger, paid less and likely to have longer future service."
FN2. The Halligan plaintiffs successfully moved the district court to extend the time for filing their motion for class certification until October 30, 1995.

FN3. The Superior Court dismissed the Winspear action on several grounds: (1) the claims of some of the plaintiffs were barred because they had failed to file administrative charges with the state agency within the statutory six-month limitations period; (2) the Massachusetts statute under which plaintiffs brought their claims did not apply to some of the plaintiffs who were employed outside Massachusetts; and (3) the claims brought by out-of-state plaintiffs under their respective state laws were dismissed for reasons of forum non conveniens.

FN4. The court never ruled on the class action issue. It entered summary judgment against all but one of the named plaintiffs (the claim of Charles O'Neil remains pending in the district court) before plaintiffs moved for class certification. However, the district court denied class certification in Dionne, which alleged a class and claims identical to the ones alleged here. The court's primary reason for refusing to certify a class was that the Dionne plaintiffs had not shown that the ADEA requirement that all class members be "similarly situated" was met. See 29 U.S.C. s 216(b) ("An action to recover the liability prescribed ... may be maintained against any employer ... by any one or more of the employees for and in behalf of himself or themselves and other employees similarly situated."). The court stated that "[t]he fifteen nominees in this action worked in different states, for various supervisors, at different job levels, in different divisions and departments, were terminated for purportedly different reasons, and in several cases are pursuing individual remedies against Ground Round."

FN5. Plaintiffs Chapman, Connelly, Coutu, Howell, Jorgensen, Seeney, and Winspear were plaintiffs in the Winspear action.

FN6. Plaintiffs Basch, Chapman, Connelly, Eisenberg, Ezzell, Kurtz, and Seeney.

FN7. A person seeking to file a civil action under the ADEA must first file an administrative charge alleging unlawful discrimination with the EEOC. See 29 U.S.C. s 626(d). In a state which has its own laws against age discrimination and a state agency to enforce those laws, the EEOC charge must be filed within 300 days of the discriminatory event (here, discharge from employment). See 29 U.S.C. 626(d)(2); 29 U.S.C. s 633(b). An individual may commence a civil action under the ADEA 60 days after filing the EEOC charge. See 29 U.S.C. s 626(d).

FN8. The rationale behind the single-filing rule was stated by the Tolliver court:

> The purpose of the administrative charge requirement is to afford the agency the opportunity to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. s 626(d). If the agency charged with that task is satisfied that a timely filed administrative charge affords it sufficient opportunity to discharge these responsibilities with respect to similar grievances, it serves no administrative purpose to require the filing of repetitive ADEA charges....

918 F.2d at 1057. The Tolliver court also noted that the single-filing rule is equally applicable to situations in which the "piggybacking" plaintiff joins a previously existing lawsuit and to situations in which that plaintiff files a separate lawsuit. See id. ("The purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit or initiate their own.").

FN9. Plaintiffs sought to piggyback on the administrative filings of the Dionne plaintiffs to satisfy their own filing requirements. William Hayden, a Dionne named plaintiff, filed administrative charges with the EEOC on January 8, 1993. This was within the 300 day filing period for each of the plaintiffs in the current action. Hayden's counsel filled out a standard EEOC charge form, alleging only individual discrimination. Counsel sent a letter along with the charge, addressed to the EEOC area director, which stated:

> This office represents Mr. William Hayden and others in a claim against their former employer, The Ground Round, Inc., for age discrimination....
>
> We expect to be filing a class action suit in federal court on behalf of Mr. Hayden and others similarly situated....
>
> [W]e represent several complainants and expect to be filing a class action in federal court....

Later, along with Roger Dionne's EEOC charge, counsel sent another letter which stated the following:

> This office represents William Hayden and Roger Dionne in their claim against their former employer, Ground Round, Inc. [,] for age discrimination.
>
> ....
>
> We have reason to believe that Ground Round has terminated a number of employees in carrying out a companywide [sic] policy to terminate older employees. At this point I know of some fourteen former employees who have been affected by this policy in the eastern region, several of which have contacted me. My intent is to file a class action complaint against Ground Round, Inc. As such, this letter is to notify you that the claims filed by Mr. Hayden and Mr. Dionne are on behalf of themselves and also on behalf of those similarly situated.

Defendant argues that, although counsel's letters alleged class-wide discrimination, the charges themselves did not and the letters cannot substitute for the charges. Plaintiffs argue that the letters alone would have sufficed as administrative charges under the ADEA, and they therefore should suffice to serve as proper notice of allegations of class-wide discrimination. There is nothing in the record as to whether Ground Round ever received copies of those letters while the matter was before the EEOC.

FN10. 29 U.S.C. s 626(e) provides:

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person ... against the respondent named in the charge within 90 days after the date of the receipt of such notice.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1550

ALAN BASCH, ET AL.,
Plaintiffs, Appellants,

v.

THE GROUND ROUND, INC.,
Defendant, Appellee.

BEFORE

BOUDIN, Circuit Judge,
ALDRICH, Senior Circuit Judge,
LYNCH, Circuit Judge.

ORDER OF THE COURT

Entered: April 13, 1998

It is ordered that the petition for rehearing is denied.

By The Court:

Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 95-12198-RGS

ALAN BASCH, ROBERT EISENBERG, SUSAN WINSPEAR,
PETER COUTU, THOMAS HOWELL, WILLIAM JORGENSEN, CHARLES O'NEIL, DIANA KURTZ, SCOTT SEENEY, SHANO EZZELL, ANDREW CHAPMAN, and WILLIAM CONNELLY

v.

THE GROUND ROUND, INC.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

January 15, 1997

Contending that they were victims of a company policy of age discrimination, the plaintiffs, all of whom are former Ground Round, Inc. managers, filed this class action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. Ground Round contends that the plaintiffs' claims are barred by res judicata and the ADEA's statute of limitations. Plaintiffs dispute the applicability of res judicata to their claims and propose to "piggyback" onto another employee's timely filed administrative charge, thus circumventing the statute of limitations. Alternatively, the plaintiffs contend that they are

excused from the administrative charge requirement because other terminated employees had previously filed suits against Ground Round giving notice of an impending class action. Before the court is Ground Round's motion for summary judgment.

FACTS

The twelve plaintiffs lost their managerial jobs at Ground Round to younger replacements. Each plaintiff filed (and later withdrew) an administrative charge of age discrimination with the EEOC.[1] Eight of the plaintiffs then filed an age discrimination class action against Ground Round in the Massachusetts Superior Court pursuant to G.L. c. 151B, § 4.[2] The Superior Court eventually dismissed the state action and, on November 20, 1995, granted Ground Round's Motion for Separate and Final Judgment.[3]

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[1] The chart appended to this decision lists each plaintiff's date of termination, the date of his or her administrative filing, and date of the administrative withdrawal. This lawsuit was filed on October 6, 1995.

[2] Teresa McCarthy and Carlton Stasiowski were also plaintiffs in the Superior Court, but are not parties to this action.

[3] The Complaint in the Superior Court action consisted of six counts: Count I – violations of G.L. c. 151B (all plaintiffs); Count II – violation of rights secured to Charles O'Neil by Conn. Gen. Stat. § 46a-60; Count III – violation of rights secured to Thomas Howell by Md. Ann. Code, art. 49B, § 16; Count IV – violation of rights secured to Susan Winspear and William Jorgensen by N.Y. EXEC. LAW § 296 (McKinney 1993); Count V – violation of rights secured to Peter Coutu by R.I. Gen. Laws, § 28-5-7; Count VI – bad faith termination of employment (all plaintiffs). Judge Moriarty dismissed Count I as to plaintiffs Winspear, Coutu, Howell, Jorgensen and O'Neil, noting that they did not work or live in Massachusetts and had not filed administrative claims with the Massachusetts Commission Against Discrimination ("MCAD") prior to filing suit. The claims of Chapman and Connelly, who are Massachusetts residents, were dismissed for failing to file a claim with the MCAD. Judge Moriarty dismissed Counts II through V of the

On April 20, 1993, some two years before the collapse of the plaintiffs' state case, Roger Dionne and William Hayden, also former Ground Round managers, filed an ADEA lawsuit against Ground Round in the federal district court. The Dionne and Hayden Complaint, apart from individual claims, purported to assert the claims of all similarly situated managerial and supervisory employees of Ground Round. Two other terminated managers, David Halligan and Robert Whitelaw, filed an ADEA suit of their own on November 23, 1993. Counsel then moved to "consolidate" the two cases.4 Although the motion for consolidation was denied, the Halligan case was eventually reassigned to this session after another judge of the court decided that it was ""affiliated""with Dionne. Halligan v. Ground Round, C.A. No. 93-12558-RGS, Docket Entries

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Complaint (claims brought by out-of-state plaintiffs under the discrimination laws of their respective states) for reasons of forum non conveniens. Count VI Judge Moriarty dismissed as duplicative of Count I.

Judge Moriarty observed that "[I]f the motion [for summary judgment] in this case were directed to the merits of the cases of the individuals plaintiffs, I would agree with the plaintiffs' [opposition to dismissal]. However, the motion is not so directed. This motion is directed toward the jurisdiction of the court to entertain the plaintiffs' claims and toward the appropriateness of an action in this court under the doctrine of forum non conveniens. For purposes of this motion there is no issue as to motive, intent or state of mind of the parties. The issues are procedural in nature and with the single exception of the date of termination of plaintiff Seeney's employment the facts necessary to a determination of those issues are undisputed. The issues being decided are purely issues of law." See Plaintiffs' Memorandum, Ex.B at 18-19.

On September 6, 1995, Judge Connolly dismissed Seeney's c. 151B claim. Judge Donovan entered Separate and Final Judgment on November 20, 1995, with respect to all claims.

[4] Sara Fleschner, counsel for Dionne, Hayden, Halligan and Whitelaw, also represents the plaintiffs in this case.

dated 12/29/93 and 3/29/94. It appears thereafter to have lain dormant on the court's docket.

On December 15, 1993, Dionne and Hayden moved to certify as a class "all managerial and supervisory employees of Ground Round who are either currently employed or whose employment had been terminated by Ground Round since January 1, 1990, and who are or were over 40 years of age at material times." The court denied the motion to certify on July 6, 1994, after determining that the proposed class did not satisfy the "similarly situated" or "commonality" requirements of Rule 23. See Dionne v. Ground Round, Inc., C.A. No. 93-11083-RGS, slip op. (D. Mass. July 6, 1994).

Four of the present plaintiffs, Basch, Eisenberg, Kurtz and Ezzell, who were not parties to the Superior Court action, joined plaintiffs Winspear, Coutu, Howell, and Jorgensen in seeking to intervene in Dionne. On October 31, 1994 the motion to intervene was denied. An appeal was taken, and on September 19, 1995 the District Court's judgment was affirmed by the First Circuit Court of Appeals. On October 6, 1995, the eight Superior Court plaintiffs, joined by Basch, Eisenberg, Kurtz and Ezzell, filed this lawsuit.

DISCUSSION

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Gaskell v. Harvard Co-op. Soc., 3 F.3d 495, 497 (1st Cir. 1993).

Doctrine of Res Judicata as a Bar to Previously Filed Claims

Ground Round argues that the doctrine of res judicata (claim preclusion) bars the eight Superior Court plaintiffs from relitigating their age discrimination claims in federal court. Res judicata acts as a bar to a later filed action only where (1) there is a final judgment on the merits in the earlier action; (2) sufficient "identicality" exists between the parties in the two actions; and (3) sufficient "identicality" exists between the causes of action asserted in the earlier and later suits. Apparel Art International, Inc. v. Amertex Enterprises, Ltd., 48 F.3d 576, 583 (1st Cir. 1995); Aunyz Corp. v. Canon U.S.A., Inc., 978 F.2d 3, 6-7 (1st Cir. 1992). When applying the doctrine to a state court judgment, a federal court defers to the law of the state in which the judgment was rendered.

> Massachusetts courts apply res judicata in a perfectly traditional manner. That is to say, the doctrine prevents the relitigation of "issues that were or could have been dealt with in an earlier litigation." The entry of a valid and final judgment on the merits "extinguishes . . . all rights of a plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the complaint arose."
>
> In Massachusetts, as elsewhere, a second claim is barred "even though the plaintiff is prepared in the second action . . . to present evidence, grounds, or theories of the case not presented in the first case . . . ." The issue is "not whether the plaintiff in fact argued his

> [civil rights] claims in the state proceeding, but whether he could have."
>
> The question, as put by the Massachusetts courts, is whether the second claim "grows out of the same transaction, act, or agreement and seeks redress for the same wrong," or whether "the second claim is an impermissible variation on the theme of the first."
>
> The Massachusetts standard is essentially the same transactional test as that dictated by federal law.

Mulrain v. Board of Selectmen of Town of Leicester, 944 F.2d 23, 25 (1st Cir. 1991) (citations omitted).

Plaintiffs' G.L. c. 151B claims were dismissed by the Superior Court on procedural and jurisdictional grounds, not on their merits. In Oscar Mayer & Co. v. Evans, 441 U.S.750, 763 (1979), the Supreme Court, while upholding the right of states to enforce administrative filing requirements and deadlines as the price of admission to their courts, declared that it would "not attribute to Congress an intent through § 14(b) to add these explicit requirements by implication and to incorporate by reference into the ADEA the various state age-discrimination statutes of limitation." A dismissal on limitations grounds thus has a preclusive effect only on an action filed in a jurisdiction with a similar statute of limitations. See Martel v. Stafford, 992 F.2d 1244, 1245-1246 (1st Cir. 1993); Reinke v. Boden, 45 F. 3d 166, 169-172 (7the Cir. 1995). See also Wright, Miller & Cooper, Federal Practice and Procedure, § 4441, at 368 (1981). Because the Superior Court did not reach the merits

of the state plaintiffs' age discrimination claims, the Superior Court dismissal is not a bar to this action.

Piggybacking Administrative Claims

Ground Round also argues that the claims of plaintiffs Basch, Eisenberg, Kurtz, Ezzell, Seeney, Connelly and Chapman are barred by the fact that they failed to file discrimination charges with the EEOC within three hundred days, as required.[5] The plaintiffs, who admit that they did not file, seek to avoid this usually fatal misstep by "piggybacking" onto the timely filings of William Hayden and Roger Dionne.

In a prior decision issued July 6, 1994, this court adopted the majority rule permitting claimants to "piggyback" onto previously filed administrative claims if the timely filed claim can be fairly read to give notice to both the state (or federal) anti-discrimination agency and the employer of the existence of similarly aggrieved claimants. See Kloos v. Carter-Day Co., 799 F.2d 397, 401 (8th Cir. 1986). The notice requirement is an outgrowth of the policy of the ADEA (and similar anti-discrimination statutes) promoting conciliation and the avoidance of litigation. Id. At 400. For that reason, even those courts recognizing the "piggybacking" rule, have construed the notice requirement strictly. In Kloos, for example, the Eighth Circuit held that a letter written by counsel to the EEOC supplementing an administrative charge with class claims did not cure the

[5] Persons seeking relief under the ADEA in states with law prohibiting age discrimination in employment are required to file an administrative charge of discrimination with the proper state agency within three hundred days of the alleged unlawful practice. 29 U.S.C. §§ 626(d)(2) and 633(b). Sixty days after an agency charge has been filed, the party may elect to bring a lawsuit. 29 U.S.C. § 626(d).

omission of the claims from the underlying charge. Id. At 401. Cf. Andrews v.Arkwright Mutual Ins. Co., 423 Mass. 1021, 1022 n. 1 (1996) (holding that a letter to the MCAD did not serve as the equivalent of a formal complaint, as a complaint must be signed, notarized and sufficiently detailed to give notice of the claimed acts of discrimination). Here, the circumstances are not unlike those in Kloos. The Dionne and Hayden charges make no mention of class claims. Plaintiffs point to a cover letter written by attorney Sara Fleschner to the EEOC, which she mailed with the Dionne filing, stating that she "expect[ed] to be filing a class action suit in federal court on behalf of Mr. Hayden and others similarly situated." See Plaintiffs' Exhibit E. While amendments of charges are allowed to "clarify or amplify [the original] allegations," 29 C.F.R. § 1626.8(c), the letter did not purport to amend the underlying Dionne and Hayden filings; it did nothing more than indicate a possible future litigation strategy. And even if construed as a notice of some kind to the EEOC of a possible class action, it did noting to apprise Ground Round of that fact. As the federal court recognized in Kloos (and the Supreme Judicial Court in Arkwright), permitting plaintiffs to wander outside the rules of formal pleading by supplementing their claims with allegations contained in casual documents invites confusion and unfairness.[6] Thus the piggybacking rule does not save the cases of these seven plaintiffs.

Acknowledging the notice issue, plaintiffs claim that the service of the Dionne Complaint on April 27, 1993, gave Ground Round constructive notice of the existence of a

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[6] An analogous circumstance is the incurable habit many attorneys have of writing judges directly to raise issues or claims overlooked in the pleadings. I would not expect the EEOC or MCAD to give similar communications any more standing or consideration than I would.

potential class. To hold otherwise, plaintiffs insist, is to exalt form over substance. I disagree. 29 U.S.C. § 626(d) directs the EEOC upon receipt of a charge to notify the employer. Section 626(d) also directs the EEOC to "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." The scope and direction of the EEOC's mandate is determined by the language of the charge itself. See Lattimore v. Polaroid Corporation, 99 F.3d 456, 464-465 (1st Cir. 1996) (limiting subsequent civil claims to the scope of the administrative charge). The law places no corresponding burden on an employer to initiate EEOC investigation and conciliation. Thus service of the class allegations of the Dionne Complaint, even if it were held sufficient notice as to Ground Round, did not give the EEOC the comparable notice to which it was entitled.[7] See Lattimore, 99 F.3d at 464 (the purpose of the administrative charge requirement "is to provide the employer with prompt notice of the claim and to create an opportunity for early conciliation" (emphasis added)); Kloos, 799 F2.2d at 400 (noting that "[a]llowing class actions without administrative charges that fairly anticipate class claims would undermine the notice and conciliation purposes of the filing requirement"); Burt v. Manville Sales Corp., 116 F.R.D. 276, 278 (D. Colo. 1987) (holding that plaintiffs could piggyback administrative filings as sufficient information was contained in EEOC filings to enable the EEOC to "analyze, conciliate and/or correct [class] ADEA violations"). Thus, service of the Dionne Complaint does not save the claims of the seven

[7] Plaintiffs do not cite a single case where the EEOC excused a plaintiff, particularly one represented by counsel, from its procedural requirements. Compare Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 896 (1st Cir. 1992); Conroy v. Boston Edison Co., 758 F. Supp. 54, 61 (D. Mass. 1991).

plaintiffs (Basch, Eisenberg, Kurtz, Seeney, Ezzell, Chapman and Connolly) who did not timely file administrative claims with the EEOC.

Ninety Day Statute of Limitations

Even if this court is incorrect as to the piggybacking issue, O'Neil is the only one of the twelve plaintiffs who complied with the ADEA's ninety day statute of limitations.[8] 29 U.S.C. § 626(e). See Anderson v. Unisys Corp., 47 F.3d 302 (8th Cir. 1995). The ninety day statute of limitations, which was added by Congress to the ADEA in 1991, requires a claimant to file suit within ninety days of withdrawing an administrative charge from the EEOC. Section 626(e)(2) states that "if a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within ninety days after the date of the receipt of such notice." Even where plaintiffs are piggybacking on a timely filed charge, once they file administrative charges of their own, they can no longer rely on the piggybacked case. Anderson, 47 F.3d at 308-309. Thus the eleven plaintiffs who did not file suit within ninety days of withdrawing charges are within the bar of section 626(e). Id. At 309. See also St. Louis v. Texas Worker's Compensation Com'n, 65 F.3d 43, 46-47 (5th Cir. 1995).

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[8] O'Neil filed a charge of discrimination with the Connecticut Commission of Human Rights and Opportunities and the EEOC on December 28, 1993, within two months of his termination. See Moroz Aff., at Ex. B and C.

Plaintiffs attempt to circumvent section 626(e) by riding two horses. They attempt to use the Dionne filings to satisfy the EEOC charge requirement, and the dormant Halligan case to satisfy the ADEA statute of limitations.[9] Plaintiffs' argument with respect to Halligan relies on the holdings of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), and Crown Cork & Seal Co. v. Parker, 462 U.S. 345 (1983). In American Pipe, the Supreme Court held that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. "[A]t least where class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of members is impracticable, the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."[10] Id. At 552-553. Crown Cork in turn holds that "[o]nce the statute of limitations has been tolled [by the filing of a class action], it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own action or to intervene as plaintiffs in the pending action." 462 U.S. at 354 (emphasis added).

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[9] The Halligan case was voluntarily dismissed by the Halligan plaintiffs on December 21, 1995. The instant plaintiffs filed this action on October 6, 1995.

[10] Basch, Eisenberg, Winspear, Coutu, Howell, Jorgensen, Kurtz and Ezzell then moved unsuccessfully to intervene in the Dionne action. I denied that motion on October only my denial of their motion to intervene. The Order denying the motion to intervene was affirmed by the First Circuit Court of Appeals on September 19, 1995.

Neither the Dionne nor the Halligan case save the claims of the eleven plaintiffs who failed to file timely charges. After class certification was denied in Dionne, eight of the present plaintiffs sought to become intervenors. The effort failed. Plaintiffs appealed the denial of the motion to intervene, but not the denial of class certification, thus triggering the ninety day statute of limitations.[11] Only plaintiff O'Neil filed a timely charge. The Halligan plaintiffs meanwhile never sought to certify a class. See Baxter v. Palmigiano, 425 U.S. 308, 325 n.1(1976) (order of certification changes individual suit containing class allegations into a class action); In re Northern Dist. Of Cal., Dalkon Shield, Etc., 693 F.2d 847, 854-855 (9th Cir. 1992) (same); In re Air Disaster Near Honolulu, Hawaii, 792 F. Supp. 1541 (N.D. Cal. 1990) (court would consider class certification upon motion by plaintiffs). Certification requires a court to make specific findings regarding numerosity, commonality, typicality and adequate representation by the named plaintiffs. See Fed. R. Civ P. 23(c)(1). A court does not make these findings sua sponte, but on a proper motion by plaintiffs.

Finally, there is the aspect of plaintiffs' counsel splitting what appeals to have been conceived as a unitary class action into two separate cases, choosing to prosecute class certification in Dionne, while holding back Halligan as insurance should the Dionne and Halligan cases described

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[11] Plaintiffs cannot avoid the fact that they had notice on July 6, 1994, that their claims were not eligible for class treatment. See Dionne, Memorandum and Order on Motion for Class Certification, at 8-9. Sara Fleschner, and the firm, Kushner & Sanders, have represented Dionne, Hayden, Halligan, Whitelaw and the plaintiffs in this case throughout these proceedings.

virtually identical classes.[12] See Plaintiffs' Opposition, at 17. The administrative filings for Eisenberg, Winspear, Coutu, Howell, Jorgensen, Seeney and Connolly, together with the Halligan Complaint itself, were attached to the Dionne motion for class certification. Halligan personally submitted an affidavit supporting certification in Dionne. As Justice Powell observed in his concurring opinion in Crown Cork, the tolling rule is one easily abused. "It seems important to reiterate the view expressed by Justice Blackmun in American Pipe . . . that our decision 'must not be regarded as encouragement to lawyers . . . to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.'" 462 U.S. at 354.

ORDER

For all of the foregoing reasons, the defendant's motion for summary judgment is ALLOWED as to all plaintiffs except Charles O'Neil.

SO ORDERED

Richard G. Stearns
UNITED STATES DISTRICT JUDGE

[12] In Dionne, the putative class was defined as "[a]ll managerial and supervisory employees of Ground Round who are either currently employed or whose employment has been terminated by Ground Round since January 1, 1990, and who are or were over 40 year of age at material times." In Halligan, the putative class was described as "all past, present and future employees of Ground Round, who have been or may be terminated from their employment on the basis of age, but excluding those who left Ground Round's employ prior to January 1, 1990."